OCBC BANK (MALAYSIA) BHD

v.

GKM AMAL BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-1389-1998]
8 FEBRUARY 1999

CIVIL PROCEDURE: *Summary judgment - Loan facilities given by plaintiff bank - Whether plaintiff imposed excessive interest rates - Whether against public policy - Triable issues - Whether case should go for trial*

The plaintiff appealed against the decision of the Senior Assistant Registrar who dismissed the plaintiff's O. 14 application against the defendants.

The plaintiff claimed for the sum of RM2,098,037.15 when the defendants failed to pay the said sum as a result of an overdraft facility granted to the 1st defendant. The 2nd defendant, the director of the 1st defendant, was the guarantor of the said facility.

The defendants claimed that the increase in the interest rates imposed by the plaintiff were excessive and against public policy. On the other hand, the plaintiff contended that it had the contractual right to raise the interest rates under the Facility Agreement entered between the parties pursuant to the overdraft facility that was granted.

Held:

[1] The issue of whether the rates of interest imposed by the plaintiff were excessive or not depended on the particular facts and circumstances of the case. On the available evidence, this court was unable to come to any definite conclusion. This was a clear case for further investigation and inquiry through a trial proper in which relevant witnesses have to be called.

[2] The doctrine of public policy is to be applied sparingly and should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds. If the defendants could show that this case fell within any of those clear cases, it would be wrong to deny them the opportunity. This was an issue of fact which ought reasonably to be ventilated in a trial proper.

[3] In view of the above, the defendants raised triable issues.

[Appeal dismissed.]

Case(s) referred to:
Shaikh Faisal t/a Gibca v. Swan Hunter Singapore Pte Ltd [1995] 1 SLR 394 ***(refd)***
Theresa Chong v. Kim Khoon & Co [1976] 2 MLJ 253 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1

Other source(s) referred to:
Law of Contract, Cheshire & Fifoot, 8th edn, p 322

For the plaintiff - KC Su; M/s Chan & Assoc
For the defendants - CK Ong; M/s Ong Manickam & Co

Reported by Usha Thiagarajah

JUDGMENT

Steve Shim J:

This is an appeal by the plaintiff against the decision of the learned Senior Assistant Registrar in dismissing with costs the O. 14 application taken out by the plaintiff against the defendants in encl. 4. A brief factual background leading to this application is in order.

Upon the application of the 1st defendant, the plaintiff granted the 1st defendant overdraft facility of RM2,000,000 *vide* letter of offer dated 6 February 1997. The overdraft facility was secured by the facility agreement dated 12 March 1997 and the letter of guarantee by the 2nd defendant, a director of the 1st defendant, dated 7 March 1997. It was a term of the facility agreement that the overdraft facility had to be repaid within three months from the date of the listing of the 1st defendant's shares on the Kuala Lumpur Stock Exchange (KLSE) or by 31 December 1997, whichever was earlier. By a letter dated 12 January 1998, and a resolution dated 22 February 1998 the mode of repayment was amended with the agreement of the 1st defendant in the manner stated therein. As the 1st defendant failed to regularise the overdraft account (which the 1st defendant denied), the plaintiff through its solicitors issued a notice of demand dated 24 March 1998 to the 1st defendant followed by another notice of demand dated 1 April 1998 to the 2nd defendant. Notwithstanding the said notices, which were served on the defendants, the latter failed, refused and/or neglected to pay the sum due and owing. In consequence, the plaintiff filed a writ of summons claiming the sum of RM2,098,037.15 with interests and costs. This was followed by a summons-in-chambers under O. 14 r. 1 Rules of the High Court as reflected in encl. 4.

The main thrust of the defendants' case centres on the issue of public policy. More specifically, it hinges on the question of whether or not the fluctuation upwards of the Base Lending Rate (BLR) from 9.30% to 12.25% between March 1997 and April 1998 imposed by the plaintiff in relation to the overdraft facility, coupled with the increase in the rate of interest from 2.25% to 2.75% over and above the BLR can be regarded as excessive and to such an extent as to be against public policy. From a perusal of the statements of accounts exhibited as LYK7, the plaintiff had obviously, from the period commencing March 1997 up to April 1998, been increasing the BLR from 9.30% to 12.25%, representing a rise of about 3% over a span of about a year. Then, *vide* letter dated 12 January 1998, the plaintiff had also increased the rate of interest from 2.25% over the BLR. It is the defendant's case that the imposition of such excessive rates of interests is against public policy.

In rebuttal, the plaintiff has contended that it has the contractual right to raise interest rates drawing attention to the terms of the facility agreement dated 12 March 1997 (exh. LYK5). It also relies on cl. 5(1) and sch. 11A which apparently allows for interest rate to be increased from 2.25% to 2.75% above the BLR and that written notification of such increase was given to the 1st defendant *vide* letter dated 12 January 1998. Further, the increase was also notified through the various statements of accounts exh. LYK7.

It is true that although the defendants have not disputed the contractual right of the plaintiff to raise the rate of interest, they are nevertheless disputing the plaintiff's right to raise the interest rate excessively. They are alleging that the fluctuation upwards of the BLR from 9.30% to 12.25% within a span of about 12 months coupled with the increase of the initial interest rate from 2.25% to 2.75% over and above the BLR, is certainly excessive in all the circumstances. Obviously, whether the rates of interest imposed by the plaintiff are excessive or not must depend on the particular facts and circumstances of the case. I have to say that on the available evidence as disclosed in the affidavits and documents, this court is quite unable to come to any definite conclusion one way or the other. This is clearly a case for further investigation and inquiry through a trial proper in which relevant witnesses may have to be called.

Associated with the issue of excessive rates of interest, the defendants have also raised the question of whether or not the imposition of such excessive rates by the plaintiff is contrary to public policy. Here, the defendants have exhibited a number of newspaper cuttings which apparently contain the views of various top government leaders complaining about the banks in this country charging excessive rates of interest. In this connection, counsel for the defendants has submitted that such public statements involving, as they do,

the public interest could be construed as a matter of public policy. In response, counsel for the plaintiff has reiterated that such statements do not fall within what is known as public policy in law, citing in support of their proposition, the Singapore case of *Shaikh Faisal t/a Gibca v. Swan Hunter Singapore Pte Ltd* [1995] 1 SLR 394, in particular that part of the judgment of Chao Hick Tin, J which states:

> I would have thought that for a contract or an act to infringe public order or morals, it must be a contract or an act which is obviously wrong or improper; no right-minded person in society would at the relevant time think that the contract or act complained of is proper. It must tend to be injurious to the public or against public good. Public policy must be distinguished from the policy of the government of the day... What I am trying to say is that policies of a government or its department must be distinguished from what is known as public policy in law. Such governmental or departmental policies do not necessarily represent public policy which would vitiate contracts: see *Monkland v. Jack Barclay Ltd.*

Although counsel for the plaintiff has laid emphasis on the second part of that passage to reinforce his proposition that public policy has to be distinguished from the policy of the government, he should not, in fairness to the defendants, overlook the first portion of that passage where the learned judge is clearly of the view that a contract or act cannot be said to infringe public order or morals unless the contract or act is so obviously wrong or improper that no reasonable person would think that the said contract or act complained of is proper and tending to be injurious to the public or against the public good. I am prepared to adopt the same approach. Such matters are plainly issues of fact which ought reasonably to be determined in a trial proper as was done in *Shaikh Faisal.*

Counsel also refers to *Theresa Chong v. Kim Khoon & Co* [1976] 2 MLJ 253 where the Federal Court held that a contract entered into by an unregistered remisier in contravention of the rules and bye-laws of the Stock Exchange was not contrary to public policy because the bye-laws were those of a private body which had no force of law. Here counsel appears to submit that *Theresa Chong* is authority for the proposition that courts are restricted from extending the doctrine of public policy beyond the classes of cases already covered by it, suggesting, it seems, that the present case does not fit into any of those classes. With respect, I do not think that the restriction laid down in *Theresa Chong* is total. This is evident from that part of the judgment of Gill, CJ (Malaya) which reads:

> On the question of what is contrary to public policy, counsel for the appellant cited to us a number of English cases. I do not consider it necessary to deal with them, because in my judgement they do not help the appellant as would appear from the following passage from the judgement of Asquith, LJ in *Monkland v. Jack Barclay Limited*:

> Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion - for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extrame reserve in holding such a contract to be a void as against public policy and should only do so when the contract is in contestably and on any view inimical to the public interest: see for example the language of the House of Lords in *Fender v. St John-Mildmay.*

> The more recent cases of *Nagle v. Feildent* and *ESSO Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd* do not carry the matter any further even though Danckwerts, LJ said in the former case that the law relating to public policy cannot remain immutable and must change with the passage of time.

Quite clearly, the doctrine of public policy is to be applied very sparingly and if I may use the words of Lord Atkin that "it should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds". See *Cheshire & Fifoot's Law of Contract* (8th edn, at p. 322). Given the circumstances, if the defendants here can show that the instant case falls within any of those clear cases, it would be wrong to deny them the opportunity. This is obviously an issue of fact which ought reasonably to be ventilated in a trial proper.

In summary therefore, the defendants have been able to raise triable issues relating to the question of whether or not the rates of interest imposed by the plaintiff were excessive in all the circumstances and also the question of whether or not, the imposition of such excessive rates is contrary to public policy. On that ground alone, it is sufficient for me to uphold the decision of the learned Senior Assistant Registrar and dismiss this appeal with costs.